(5)

NO. 90-89

SUPREME COURT, U.S.
FILED
JAN 9 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS AND ITS MEMBERS, ALEX PACHECO, AND LOUISIANA IN SUPPORT OF ANIMALS AND ITS MEMBERS
Petitioners

V.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, NATIONAL INSTITUTES OF HEALTH AND THE INSTITUTES FOR BEHAVIOR RESOURCES, INC.
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
BARBARA L. HERWIG
LOWELL V. STURGILL, JR.
Department of Justice
Washington, D.C. 20530
Phone: 202-514-2217
Attorneys For Respondent NIH

MARGARET E. WOODWARD
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: 504-525-9538
Attorney For Petitioners

EDGAR H. BRENNER
The Behavioral Law Center
3301 New Mexico Ave. N.W.
Washington, D.C. 20016
Phone: 202-244-8688
Attorney For Respondent
Institutes for Behavior
Resources, Inc.

GREGORY C. WEISS
4500 One Shell Square
New Orleans, LA 70139
Phone: 504-581-3234
Attorney For Respondent
Administrators of the Tulane
Educational Fund

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

		Appendix To Petition	Joint Appendix
1. DOCKET ENTRIES			iv
2. PLEADINGS			
12/28/88 - 12/30/88 -	Petition Removal Petition	A-30	1
1/6/89 -	Temporary Restraining Order of Federal District Court	A-16	
1/12/89 -	Plaintiffs' Motion for Remand and Memorandum in Support		3
1/13/89 -	Amended Removal Petition		16
1/17/89 -	Second Amended Removal Petition		17
1/18/89 -	NIH Opposition to Motion to Remand		19
2/1/89 -	Denial of Motion to Remand & NIH Motion to Dismiss	A-17	
4/12/89 -	Denial of NIH's Second Motion to Dismiss	A-18	

TABLE OF CONTENTS (continued)

		Appendix To Petition	Joint Appendix
4/17/89 -	Notice of Appeal by NIH	A-27	
5/3/89 -	Denial of Motion for Indicative Ruling	A-19	
5/19/89 -	Second Notice of Appeal by NIH	A-29	
7/5/89 -	Plaintiffs' Motion to Dismiss Appeal and Memorandum in Support		24
8/1/89 -	Reply to NIH's Opposition to Motion to Dismiss Appeal		29
8/9/89 -	Denial of Motion to Dismiss Appeal	A-22	
8/17/89 -	Denial of Motion to Compel Discovery (Magistrate)	A-20	
9/13/89 -	Denial of Motion to Compel (District Court)	A-24	

TABLE OF CONTENTS (continued)

		Appendix To Petition	Joint Appendix
3/8/90 -	Decision of 5th Circuit on Appeal	A-1	
4/13/90 -	Denial of Petition for Rehearing	A-24	

RELEVANT DOCKET ENTRIES

DATE	Pleading/Proceeding
12/28/88	Petition for Declaratory and/or Injunctive Relief filed in State Court
12/28/88	State Court issuance of temporary restraining order against Tulane
12/30/88	Removal Petition filed by NIH
1/6/89	Temporary restraining order entered against Tulane and NIH by federal district court
1/12/89	Plaintiffs move for remand
1/13/89	Amended Removal Petition filed by NIH
1/17/89	Second Amended Removal Petition filed by NIH
1/18/89	Opposition to Motion to Remand filed by NIH
2/1/89	Denial of Motion to Remand
4/12/89	Denial of NIH's second Motion to Dismiss
4/12/89	Notice of Appeal by NIH from denial of Motion to Dismiss
5/2/89	Motion for an Indicative Ruling by NIH
5/3/89	Denial of Indicative Ruling; TRO continued in effect
5/19/89	Notice of Appeal by NIH from denial of indicative ruling
7/5/89	Plaintiffs' Motion to Dismiss Appeal
8/9/89	Denial of Motion to Dismiss Appeal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Received Dec 30 88

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	No. 88-5713
V.		
	*	SECTION: "L" Mag. 2
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	

* * *

PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA:

Petitioners, The National Institute of Health, and the Deparatment of Heaith and Human Services, through the United States of America, represented herein by the undersigned Assistant United States Attorney, respectfully represent:

I.

Petitioner, The National Institute of Health, an agency in the Department of Health and Human Services, has been made a defendant in the above-captioned civil action now pending in the Civil District Court, parish of Orleans, State of Louisiana, No. 88-24949, Division "H".

II.

The above-captioned action is one which may be

removed without bond to this Court pursuant to Title 28, United States Code, Section 1442(a), for the reason that your petitioner, The National Institute of Health, is an agency of the United States of America, and the Federal District Courts have original jurisdiction over all actions commenced against such federal agencies.

III.

The above-captioned action is one which may be removed without bond to this Court pursuant to Title 28, United States Code, Section 1446(d).

IV.

Petitioner, The National Institute of Health, through the United States of America, files herewith a copy of all pleadings which to the best of its information have been filed in the State Court action.

WHEREFORE, the petitioner prays that the above-captioned action now pending in the Civil District Court, Parish of Orleans, State of Louisiana, be removed therefrom to this Honorable Court.

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Ruth Morris Force

RUTH MORRIS FORCE
Assistant U.S. Attorney
Hale Boggs Federal Building
500 Camp Street, Room 205
New Orleans, LA 70130
Telephone: (504) 589-3518
LA Bar Roll No.: 5683

NOTE:CERTIFICATE OMITTED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Received - Jan 12 89

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	NO. 88-5713
VERSUS	*	
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	SECTION "L"

MOTION TO REMAND

NOW INTO COURT through undersigned counsel come plaintiffs International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members and move the Court to remand this action to the Civil District Court for the Parish of Orleans, where it was originally filed, for the reasons set forth in the accompanying memorandum.

/s/ Margaret E. Woodward

MARGARET E. WOODWARD
BAR NO. 13677
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: 504-525-9538
Attorney For Plaintiffs

NOTE: CERTIFICATE OMITTED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	NO. 88-5713
V.	*	
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	SECTION "L"
	*	MAG. 2

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR REMAND

I. *INTRODUCTION*

This is an action brought by plaintiffs, the International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members, for declaratory and/or injunctive relief to prevent the senseless and needless killing of primates who have become known as the "Silver Spring Monkeys." This action initially was filed in Orleans Parish Civil District Court against defendants Administrators of the Tulane Educational Fund, The Institute for Behavioral Resources Inc. (IBR) and the National Institute of Health (NIH). The petition is predicated upon Louisiana state law and state public policy and seeks injunctive relief against the defendants. Monetary damages are not sought because there is no adequate pecuniary standard for the measurement of damages which have been sustained by the plaintiffs as a result of the treatment of these animals and would be sustained if the defendants were not prohibited from needlessly killing the monkeys.

Plaintiffs' petition was filed in the Civil District Court for the Parish of Orleans on December 28, 1988 and on that same date, the Civil District Court issued a temporary restraining order enjoining the Administrators of the Tulane Educational Fund from killing or otherwise conducting any inhumane treatment of the Silver Spring Monkeys.

Two days later, defendant NIH and the Department of Health and Human Services (in which NIH is an agency) petitioned for removal of the state court action to this Court. In support of their authority to seek removal, defendant NIH and HHS cite to 28 U.S.C. Sec. 1442(a). Petitioner NIH contends that it is an agency of the United States of America and that pursuant to Sec.1442(a) federal district courts have original jurisdiction over all actions commenced against such federal agencies.

Plaintiffs respectfully submit that this action is not appropriately removed to federal court and, hence, the case should be remanded to the Civil District Court for the Parish of Orleans pursuant to 28 U.S.C Sec.1447(c). The statute upon which NIH relies, 28 U.S.C. Sec.1442(a), is properly interpreted as conferring original jurisdiction upon federal district courts only in actions commenced against *natural persons who are federal officers.* By its language, the statute does not apply to state court actions in which an *agency* of the United States, rather than an officer or person, is sued. While Sec. 1442 may be subject to a broader interpretation encompassing agencies as well as officers, plaintiffs submit that in light of the language of the statute itself, the statutory history, and its purpose, the proper interpretation of Sec. 1442(a) is that removal

applies only to natural persons.

As set forth in more detail below, remand is appropriate in this instance because (1) the purpose of Sec. 1442(a) is to protect natural persons who are officers of the United States government from state courts' imposing civil or criminal liability against them for actions arising out of their federal duties; (2) plaintiffs' action is solely for injunctive relief against the defendant, including NIH and, therefore, no monetary damages are sought from any person or officer; and (3) plaintiffs' action is predicated upon Louisiana state law and public policy, and the action is directed to the actions and operations of nonfederal defendants.

II. Section 1442(a) Is Properly Interpreted as Applying Only to Actions Where Natural Persons Are Sued.

The statute upon which defendant NIH predicates its petition for removal, Sec. 1442(a), is entitled "Federal Officers Sued Or Prosecuted". That statute provides in relevant part as follows:

> (a) A civil action or criminal prosecution commenced in a state court against any of the following *persons* may be removed by them . . .
>
> (1) Any *officer* of the United States or any agency thereof, or *person* acting under *him*, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. Sec. 1442 (emphasis added).

By its terms, the statute applies to suits against natural persons, not entities of the federal government. In subsection (a), the statute specifically states that an action against any of the following listed "persons" may be removed. Further, in paragraph (1) under subsection (a), the listed person is "any officer" of the United States or any agency thereof. The person may be an officer of the United States or of a United States agency; the right to remove is not given independently to "any agency". *See City of Alma v. Bell, Galyardt and Wells, Inc.*, 606 F.Supp. 686, 689-690 (D. Neb. 1985). That the statute refers to natural persons is emphasized by the fact that the statute states that removal also may be accomplished by a "person acting under him., i.e. any officer. The statutory language clearly demonstrates that removal is limited to suits against natural persons and not other entities of the United States such as a federal agency.

Further, the purpose of the statute is to protect natural persons who are or were federal officers from being sued in state court for actions undertaken as part of their federal duties.[1] There is no indication that the statute was passed to prevent the federal government or any of its agencies in general from being sued in state court. As explained by Professor Moore, the history of Sec. 1442(a) involves concerns over the protection of persons who are federal officers from being sued in state court:

> Subsection (a) of Sec. 1442, which deals with federal officers, is based on former 28 U.S.C. Sec. 76 (1940), Sec. 33 of the Judicial Code of 1911, as amended. The roots of this statue go back beyond

[1] The right of removal is not affected by the fact that the federal officer does not have the status of a federal officer at the time removal is sought. The person need only show such status existed at the time the incident claimed of occurred. *See Camero v. Kostos*, 253 F.Supp. 331 (D. N.J. 1966).

the Force Act of 1833 to the troubled era surrounding the War of 1812. As Justice Marshall stated in *Willingham v. Morgan.*

> The federal officer removal statute has had a long history . . . The first such removal provisions was included in an 1815 customs statute. Act of February 4, 1815, Sec. 8, 3 Stat. 198. It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular.
>
> It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act 'under color' of the statute. Obviously, the removal provision was an attmept to protect federal officers from interference by hostile state court.
>
> This provision, however, was not permanent, it was by its terms to expire at the end of the war.

LA Moore's Federal Practice, Par. 0.164[1] at 379-380 (footnotes omitted)[2]

While the present law broadens coverage to include federal officers other than those involved in the enforcement of the revenue laws, the coverage was broadened to include additional employees, not to include non-natural persons or entities. *Cf. Michigan v. Banning*, 88 F.Supp.

[2] Significantly, the predecessor to paragraph 1 of Sec. 1442(a) was limited to revenue officers engaged in the enforcement of the criminal or revenue laws and those acting under or by their authority. 1A Moore's Federal Practice, 0.164[1] at 380-381.

449, 450 (E.D. Mich. 1950) ("while the present law broadens the coverage by adding many federal employees who may claim immunity from state prosecution, application of the law is still limited to those acts done by those employees 'under color of such office' "). According to Professor Moore:

> [I]n extending the application of [Sec. 1442(a)] paragraph (1) to federal officials and employees generally, the revision [of the Judicial Code of 1948] made no change in the theory or basis for removal that the civil suit or the criminal prosecution must be against the officer or employee, and based upon an act or acts done under color of office, etc.

Id. at 382-384 (footnotes omitted). Significantly, as stated by Moore, "a suit against a government corporation, as distinguished from a suit against a federal official or one acting under him, is not removable under Sec. 1442(a)(1)." *See also Lance International Inc. v. Aetna Cas. & Sur. Co.*, 264 F.Supp. 349 (S.D.N.Y. 1967) (suit against government corporation as opposed to a federal officer or one acting under him is not removable under Sec. 1442(a)(1); *Harlem River Produce Co. v. Aetna Cas. & Sur. Co.*, 257 F.Supp. 160 (S.D.N.Y. 1965). In addition, a proceeding that is wholly in rem also is not removable. *Id. See also New Jersey v. Moriarity*, 268 F.Supp. 546 (D. N.J. 1967).[3]

The petition for removal filed by the NIH and the Department of Health and Human Services raises the issue

[3] Plaintiff's petition for injunctive relief to prevent the senseless killing of the Silver Spring Monkeys closely resembles an *in rem* proceeding inasmuch as the petition raises questions and issues pertaining to the custody of the animals.

of whether an agency of the United States may remove a state court action under Sec. 1442(a) even though no federal officer has been sued. A majority of the federal courts who have considered the question have interpreted the statute as plainly not granting a federal agency such a right. *City of Alma v. Bell, Galyardt & Wells, Inc.*, 606 F.Supp. 686, 689-690 (D. Neb. 1985), *citing Brewer v. Department of Housing & Urban Dev.*, 508 F.Supp. 72, 74 (D. Ohio 1980); *Lowe v. Norfolk & Western Railroad Company*,. 529 F.Supp. 491 (D. I11. 1982); *UCPO Employees Credit Union v. Mitchell*, 421 F.Supp. 1327 (D. Mo. 1976); *California v. Bozarth*, 356 F.Supp. 667 (N.D. Cal. 1973); *Lance Int'l Inc. v. Aetna Cas. & Sur. Co.*, 264 F.Supp. 349 (S.D. N.Y. 1967). *See also Gensplit Finance Corp. v. Foreign Credit Ins. Ass'n.*, 616 F.Supp. 1504, 1509 (E.D. Wis. 1985) (By means of Sec. 1442(a)(1), "Congress intended . . . to protect individuals employed by the [federal] government against suits brought against them in state courts for actions done in the course of their official duties; there was no evident intention to protect government agencies or other [government] entities from such suits.")

In *City of Alma*, the plaintiff City sued the United States Environmental Protection Agency, the Nebraska Department of Environmental Control and other private parties in the Nebraska state court. The EPA removed the action to federal district court, citing 28 U.S.C. Sec. 1442(a). Upon review of the statutory provision and cases interpreting it, the district court concluded that the right of removal rests only in situations where individual officers are sued, not where a federal agency is a defendant. As stated by the court, "Sec. 1442(a)(1) is by its language unavailable to the EPA or the United States as authority for removal, since the EPA was sued only as an agency and no recovery is sought from individual officials." 606 F.Supp. at 690, citing *Lowe*, 529 F.Supp. at 493.

The court in *City of Alma* stated there was no need to so broadly interpret the term "federal officials" in Sec. 1442(a)(1) so as to include a federal agency "since Congress has already provided ample protection against tort suits [and contract suits] for its agencies and the entire government in the Federal Tort Claims Act, [the Tucker Act], and any other claims which could be brought in state court are barred by sovereign immunity." 606 F.Supp. at 690, citing *Lowe*, 529 F.Supp. at 494. On the other hand, the court noted that

> Without 1442(a)(1), a federal officer acting under color of federal office might not be able to adjudicate his or her defenses in a federal court unless there existed other grounds for removal. *Such is not the case with federal agencies.* Other legislation aptly channels actions against agencies into federal forums.

606 F.Supp. at 690 (emphasis added).[4]

Despite the language of Sec. 1442(a) and the statutory history cited above, both of which indicate that the removal provisions should be limited to situations in which a federal officer has been sued, some district courts have concluded that federal agencies may remove under Sec.1442(a)(1), *e.g.*, *Township of Middletown v. N/E Regional Office USPS*, 601 F.Supp. 124 (D. N.J. 1985); *Monal Construction Co. v. Brookside Limited Partnership*, 539 F.Supp. 478 (W.D. D.C. 1982); *James River Apts. v. FHA*, 136 F.Supp. 241 (D. Md. 1955). Moreover, a decision

[4] These other "channels", noted by the court in City of Alma, i.e. the Federal Tort Claims Act, the Tucker Act, and sovereign immunity, of course, only apply to actions in which damages are sought against the federal government or one of its agencies, which is not the case here.

of the Fifth Circuit, *IMFC Professional Services v. Latin American Home Health Inc.*, 676 F.2d 152 (5th Cir. 1982), has been interpreted as permitting removal by federal agencies. *See, e.g., C.H. v. American Red Cross*, 684 F.Supp. 1018, 1023 (E.D. Mo. 1987); *Woodward v. Turnage*, 646 F.Supp. 219, 221 (E.D. Mo. 1986). However, in *IMFC Professional* the Fifth Circuit did not address, much less decide, the issue before this Court, i.e. whether an agency of the federal government, rather than a federal official, may remove under Sec. 1442(a)(1).

In *IMFC Professional*, a state court action was brought against a federal official (Aetna) which had been acting directly under the administrator of the Department of Health and Human Services. HHS intervened as the real party in interest and removed the case to federal court. Plainly, the official could have removed the action under 28 U.S.C. Sec. 1442(a)(1), and because HHS contractually stood in the shoes of a federal official, its removal of the case cannot be construed as an agency removal. In its opinion, the Fifth Circuit did state that "the only prerequisite to removal of a civil action under Sec. 1442 is that it be *brought against* a federal officer of agency." 676 F.2d at 156. In making this statement however, the Fifth Circuit, was not addressing the issue before this Court of whether a federal agency, as opposed to a federal official, may remove. Rather, the court of appeals was addressing the entirely different question of whether in addition to the bringing of an action the "federal court must have subject matter jurisdiction over the claim against the *federal officer*." *Id.* (emphasis added). The circuit court held, quite correctly, that subject matter jurisdiction is not a prerequisite to removal *by a federal officer* under Sec. 1442(a).

In the case at bar, the federal defendants are named solely as federal agencies; no federal officers or individuals

are named. Further, the agencies are defendants in their own right and are not stepping in the shoes of federal officials or intervening in a pending action. As such, the reasoning of the Fifth Circuit in *IMFC* does not apply. *IMFC Professional*, therefore, should not be interpreted as expanding the scope of Sec. 1442(a) to include the right of removal by agencies of the federal government, where federal officers have not been sued.[5]

III. Federal Court Is An Inappropriate Forum For The Resolution Of This Case.

Not only is remand of this case appropriate because Sec. 1442(a) is inapplicable to suits against federal agencies, there are additional reasons why this litigation is best addressed in state court; (a) state law and nonfederal defendants predominate in this lawsuit; and (b) public policy dictates that as this suit is only for injunctive relief and not damages, the United States government does not require the protection of the federal courts.

A. State Law and Non-Federal Defendants Predominate in This Lawsuit.

Presently, the monkeys are held at Tulane University. As such, any injunctive relief would be immediately effective against Tulane. The monkeys are allegedly owned

[5] In subsequent case, *Smith v. City of Picayune*, 795 F.2d 482 (5th Cir. 1986), the court of appeals, *in dicta*, cited to *IMFC Professional* in support of the proposition that the Farmers Home Administration could remove a state court action to federal district court under Sec. 1442(a)(1). As in IMFC, the court of appeals in *Smith* did not directly address the issue of whether an agency as opposesd to a federal official may remove under the statute.

by IBR, a private corporation. The federal government's interest in the animals derives from the initial research grant that was withdrawn years ago. On previous occasions, the NIH has declared its lack of interest in the monkeys rendering its present interest in this litigation questionable. The federal government has not demonstrated how it would be affected by injunctive relief. Further, this action is bottomed solely on state law. The combination of a predominant state defendant and state causes of action makes the Louisiana state courts the best forum for this action.

B. Public Policy Dictates That This Action Be in State Court.

Removal statues, such as section 1442(a)(1), have been viewed as a means to prevent state courts from imposing personal monetary liability or criminal penalties upon individual federal officers for actions arising out of their federal duties. *See Tennessee v. Davis*, 100 U.S. (10 Otto) 257 (1880); *Arizona v. Manypenny*, 451 U.S. 232 (1981). Even if Sec. 1442(a) were interpreted as applying to federal agencies, in an action such as this, where the only relief sought is injunctive, the protections provided by the removal statute are not needed. In *Arizona v. Manypenny*, 451 U.S. at 241-242, the Supreme Court stated:

> [h]istorically, removal under Sec. 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties . . . it also enables the defendant to have the validity of his immunity defense adjudicated in the federal forum.

In the case at bar, however, the remedy requested is solely injunctive relief against a federal *agency*. There is no individual criminal action or civil liability involved, so sovereign immunity would not become an issue. Moreover, the actual entity affected by the injunction, Tulane University, is a state, not federal actor. For these reasons, public policy and judicial economy suggest that this case should be pursued in state court.

CONCLUSION

For the above mentioned reasons, plaintiffs ask this court to remand the action to the Civil District Court for the Parish of Orleans.

Respectfully Submitted,

/s/ Margaret E. Woodward
MARGARET E. WOODWARD
BAR NO. 13677
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: 504-525-9538
Attorney For Plaintiffs

OF COUNSEL:

PHILIP J. HIRSCHKOP
HIRSCHKOP, DIMURO & MOOK, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313

NOTE: CERTIFICATE OMITTED

NOTE: HEADING OMITTED

AMENDED PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA:

The United States of America, petitioner herein, hereby amends its Petition for Removal filed on December 30, 1988, in order to correct a typographical error in Paragraph II thereof. Said paragraph is amended to read:

II.

It is readily apparent that there was a typographical error in Paragraph II since the reason stated for removal in the original petition uses the language of Title 28, United States Code, Section 1441(a) rather than that of Section 1442(a).

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Ruth Morris Force

RUTH MORRIS FORCE
Assistant United States Attorney
Bar Roll Number 5683
Hale Boggs Federal Building
500 Camp Street, Room 205
New Orleans, Louisiana 70130
Telephone: (504) 589-3561

NOTE: CERTIFICATE OMITTED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	CIVIL ACTION
versus	No. 88-5713
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	SECTION L (2)

SECOND AMENDED PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA:

The United States of America and the Department of Health and Human Services, petitioners herein, hereby amend the Petition for Removal filed on December 30, 1988 and the Amended Petition for Removal filed on January 13, 1989, in order to add 28 U.S.C. § 1442(a) as an additional basis for removal of this action. Paragraph II is hereby amended to read:

II.

The above-captioned action is one which may be removed without bond to this Court pursuant to Title 28, United States Code, Section 1441(a), for the reason that your petitioner, the National Institute of Health, is an agency of the United States of America, and the Federal District Courts have original juirisdiction over all

actions commenced against such federal agencies and, also, under Title 28, United States Code, Section 1442(a) because it is a federal agency.

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Ruth Morris Force

RUTH MORRIS FORCE - Bar No. 5683
Assistant U.S. Attorney
500 Camp Street, Room 205
New Orleans, Louisiana 70130
Telephone: (504) 589-3561

NOTE: CERTIFICATE OMITTED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Received Jan 13 89

INTERNATIONAL PRIMATE PROTECTION LEAGUE, ET AL	*	CIVIL ACTION
	*	No. 88-5713
v.		
	*	SECTION "L" (2)
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, ET AL	*	

* * *

OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

On December 28, 1988, a petition for declaratory and/or injunctive relief was filed in Louisiana State Court, Civil District Court for the Parish of Orleans, against the National Institutes of Health, among others, seeking to enjoin the federal agency from performing final experimentation on three primates owned by the Institutes for Behavior Resources (IBR)[1] and in the custody of the National Institutes of Health. The action was removed to Federal District Court by the United States pursuant to 28 U.S.C. §1441(a), which provides for removal to the district court of the United States of "any civil action brought in

[1] Its name was changed from Institute for Behavioral Research, Inc.

a state court of which the district courts of the United States have original jurisdiction," and pursuant to 28 U.S.C. §1442(a), which permits removal of any civil action brought against an "officer of the United States or any agency thereof." Plaintiffs have filed a Motion to Remand which should be denied as removal is proper in this case.

REMOVAL UNDER 28 U.S.C. §1441(a)

The National Institutes of Health (NIH) is an agency of the Public Health Service, which in turn is under the Department of Health and Human Services. 42 U.S.C. §§203 and 281; 5, App.1, Reorg. Plan No. 3 of 1966. By statute, 28 U.S.C. §1441(a), "any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district embracing the place where such action is pending." This same suit was in fact heard, on removal, in federal district court and affirmed on appeal. *International Primate Protection League v. Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986). The suit was removed from state court to the United States District Court for the District of Maryland. As noted by the Fourth Circuit, Court of Appeals, plaintiffs did not oppose removal. 799 F.2d at 937. The district court retained jurisdiction over the suit and adjudicated the matter. "The finding of jurisdiction is considered to be *res judicata* of the issue." Wright, *The Law of Federal Courts*, 4th ed., §16, p. 84. If there was jurisdiction in the United States District Court for the District of Maryland on removal, there was original jurisdiction to bring suit there in the first place and, therefore, original jurisdiction for suit in this court now. This second action is removable under 28 U.S.C. §1441(a).

REMOVAL UNDER 28 U.S.C. 1442(a)

Although disputed in the Memorandum in Support of Plaintiffs' Motion to Remand, it is clearly the law of the Fifth Circuit that when a federal agency is sued in state court the suit against it can be removed under 42 U.S.C. §1442(a). *IMFC Professional Services of Florida v. Latin American Home Health*, 676 F.2d 152, 156 (5th Cir. 1982). This is so because the Fifth Circuit gives meaning to the clear language of the statute which states that a civil action commenced in state court against "[a]ny officer of the United States *or any agency thereof . . .*" *may be removed to the United States District Court. This position was reiterated by Judge Rubin in Smith v. City of Picayune*, 795 F.2d 482, 485 (5th Cir. 1986), and followed by Judge Polozola in *Ewell v. Petro Processors of Louisiana, Inc.*, 655 F.Supp. 933 (M.D.La. 1987). The *Ewell* case involved removal from state court to Federal District Court by the Environmental Protection Agency and the court specifically found removal proper under Section 1442(a). This second suit is also removal under 28 U.S.C. §1442(a).

FEDERAL LAW PREDOMINATES

Contrary to the facts presented by plaintiffs, the one defendant in this action with no real interest in it is Tulane University. They own the facility where the monkeys are being housed. The monkeys are owned by IBR and are in the custody of NIH. There is no reason, although no intention to do so, why NIH and IBR could not move the monkeys. The only effective injunctive would be one against them. NIH is an agency of the United States. An injunction against NIH is an injunction against the United States. The United States as sovereign possesses sovereign immunity and, it is well settled, cannot be sued without its consent. *Lehman v. Nakshian*, 453 U.S. 156 (1981);

U.S. v. Mitchell, 445 U.S. 535 (1980). The United States has not consented to be sued under any of the Louisiana statutes mentioned in plaintiffs' petition. This is a suit which allegedly seeks to obtain humane treatment for animals intended for use in research facilities under the direction of NIH. As noted by the Fourth Circuit, the Animal Welfare Act, 7 U.S.C. §§2131 *et seq.* is the implicated statute. 799 F.2d at 938. It is through this statute that Congress sought to insure that "animals intended for use in research facilities . . . are provided humane care and treatment." 7 U.S.C. §2131(1). It is clear that plaintiffs seek to ignore this Act in this second suit since the Fourth Circuit held, against them, that the statutory design of the Animal Welfare Act is "inconsistent with the private right of action that plaintiffs assert." 799 F.2d at 939. Nevertheless, federal not state law predominates in this case.

FEDERAL POLICY CONTROLS THIS ACTION

Contrary to the position taken by plaintiffs, the fact that this suit seeks injunctive relief against the United States rather than damages makes it more crucial that the case be heard in federal court. As previously stated, this suit against NIH is a suit against the United States because the United States is the real party in interest. *Serra v. U.S. General Services Admin.*, 667 F.Supp. 1042, 1046 (S.D.N.Y. 1987). With respect to injunctions against the United States the Supreme Court has said:

> The Congress has increasingly permitted [suits for damages] to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the government.

> It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign.

Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1948). It is clear that in a case where "the remedy requested is solely injunctive relief against a federal agency." [Memorandum in Support of Plaintiffs' Motion for Remand - last page] federal policy is the same as public policy. The case should be decided by a federal court.

For the foregoing reasons, it is contended that the Court should deny plaintiffs' Motion to Remand this action to state court.

Respectfully submitted,

JOHN VOLZ
UNITED STATES ATTORNEY

/s/ Ruth Morris Force
RUTH MORRIS FORCE
Assistant U.S. Attorney
Hale Boggs Federal Building
500 Camp Street, Room 205
New Orleans, LA 70130
Telephone: (504) 589-3561
LA Bar Roll No.: 5683

NOTE: CERTIFICATE OMITTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

Received JUL 1989

No.89-3288

International Primate Protection League, et al.

Administrators of Tulane Education Fund, et al.

MOTION TO DISMISS APPEAL

NOW COME plaintiffs, International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana In Support of Animals and its members, through undersigned counsel, and move to dismiss the appeal in the captioned matter, on the ground that no appeal lies from the interlocutory orders at issue, as more fully set forth in the accompanying memorandum.

Respectfully Submitted,

/s/ Margaret Woodward
MARGARET E. WOODWARD
Bar No. 13677
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: 504-525-9538
Attorney For Plaintiffs

NOTE: CERTIFICATE OMITTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

No. 89-3288

International Primate Protection League, et al.

Administrators of Tulane Educational Fund, et al.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

This memorandum is respectfully submitted by plaintiffs, International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and it members, in support of their Motion to Dismiss the appeal filed by the National Institutes of Health ("NIH") and the Administrators of the Tulane Educational Fund ("Tulane"). Both parties appeal from orders entered by the District Judge denying the NIH's Motion to Dismiss on April 12, 1989 and its Motion for an Indicative Ruling[1] on May 3, 1989. Because those were interlocutory orders an appeal may not be taken therefrom and this Court lacks jurisdiction over this appeal.

[1] After the filing its notice of appeal from the denial of its Motion to Dismiss, the NIH asked the district court to indicate whether it would be willing to dissolve the temporary restraining order that had been in effect since December. The court properly observed that the motion was procedurally defective, but that if the NIH was withdrawing its prior consent to the Temporary Restraining Order, a preliminary injunction hearing would be conducted promptly in the event of remand by this Court. (transcript, hearing May 3, 2989, p.)

Federal courts of appeals are courts of limited jurisdiction, having only that authority either endowed by the Constitution or conferred by Congress. See e.g., *United States v. Garner*, 749 F.2d 281, 284 (5th Cir. 1985), supplemented 752 F.2d 116 (1985). Accordingly, the threshold question in this case is whether the District Court's order is in fact appealable. *Id.*

Congress has vested the Courts of Appeals with "jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. Section 1291 (emphasis supplied). This requirement of finality has been called "an historic characteristic of federal appellate procedure." *Flanagan v. United States*, 104 S. Ct. 1054, 79 L.Ed. 2d 288 (1984) (quoting *Cobbledick v. United States*, 309 U.S. 323, 324, 60 S. Ct. 540, 541, 84 L.E.D. 783 (1940)). The final judgment rule serves a number of important interests, including preservation of the respect due trial judges by minimizing appellate court interference, reduction of the ability of litigants to harass opponents, and avoidance of clogging the appellant courts by successions of costly and time consuming appeals. *Flanagan v. United States, supra*, 104 S. Ct. at 1054; *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S. Ct. 669, 673, 66 L.Ed. 2d 571 (1981). Thus, the Supreme Court has consistently held that as a general rule, an order is final only when a court" ends the litigation on the merits and leaves nothing for the court to do but execute judgment." *Firestone Tire and Rubber Co. v. Risjord, supra*, 101 S. Ct. at 673; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S. Ct. 2454, 2457, 57 L.Ed. 2d 351 (1978).

Congress had adopted several exceptions to this strict requirement of finality, which, for the reasons set forth above, are themselves to be strictly construed.

Several of these exceptions are codified in 28 U.S.C. Section 1292 (a), on which Tulane and the NIH purport to base their appeal. That paragraph provides:

> Except as provided in subsections (c) and (d) of this section, the courts of appeals whall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Courts of the district of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where direct review may be had to the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

The order in question, denying the NIH's motion to dismiss, does not fall within any of the listed categories of appealable interlocutory orders. Thus, an appeal is not proper at this time.

Tulane and the NIH may argue that because this is an action in which a temporary restraining order has issued, the denial of the NIH's motion to dismiss might be viewed as "granting, continuing, . . . or refusing to dissolve

. . . injunctions. . .". Under 28 U.S.C. Section 1292 (a)(1) courts of appeals have jurisdiction over such orders. However, the term "injunction", is understood not to encompass temporary restraining orders. It is well settled that the issuance of temporary restraining orders and related rulings are not appealable. *Smith v. Grady*, 411 F.2d 186 (5th cir. 1969); *Chandler v. Garrison*, 394 F.2d 828 (5th Cir. 1967).

The captioned appeal from the denial of the NIH's motion to dismiss, and motion for an indicative ruling was not properly taken and is due to be dismissed. The case should be remanded so that the district Judge may conduct a hearing on plaintiffs' request for a preliminary injunction.

Respectfully Submitted,

/s/ Margaret Woodward
MARGARET E. WOODWARD
BAR NO. 13677
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: 504-525-9538
Attorney For Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record by depositing same in the U.S. mail, postage prepaid, this 5th day of July, 1989.

By:/s/ Margaret Woodward

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

NO. 89-3288

FILED - AUG - 1 1989 RECEIVED AUG - 1 1989

International Primate Protection League, et al.

v.

Administrators of Tulane Educational Fund, et al.

REPLY TO NIH'S OPPOSITION TO MOTION TO DISMISS APPEAL

This memorandum is respectfully submitted by plaintiffs the International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco, and Louisiana in Support of Animals and its members, in response to the opposition[1] filed by the National Institutes of Health ("NIH") to plaintiffs' motion to dismiss the pending appeal.

I. Summary of the Argument

In brief, the NIH presents this as "an important case that threatens the freedom of . . . the [NIH] and of other

[1] Plaintiffs filed their motion to dismiss the appeal on July 5, 1989, and it was submitted without argument on July 13, 1989. Without notifying plaintiffs, NIH obtained this Court's permission to file its opposition to the Motion to Dismiss as part of its brief on the merits. This reply is to the argument made in NIH's "statement of jurisdiction" at pp. 1-4 of its brief.

federal medical research agencies to carry out important animal research designed to improve the quality of health care for the people of this country and the world." (NIH brief, unnumbered page 1). Having framed the issue as the choice between medical research and world health care on the one hand, and plaintiffs' unreasoning opposition to these lofty goals on the other, the NIH implicitly relegates plaintiffs to a lunatic fringe group that would oppose "important research procedures" carried out "in a nonpainful manner." *Id.* The NIH's self-styled role as the defender of world health against the attack of the bedlamites begins to weaken when the NIH implicitly includes the district court, which allegedly issued a preliminary injunction in plaintiffs' favor, among the attackers.

Neither plaintiffs nor the district court pose a threat to world health. The factual issues are not as the NIH has posed them; the NIH's rightful place in this litigation is subject to grave question; federal jurisdiction over this removed action is subject to grave question; discovery on the preceding issues has just been commenced; the district court **has not granted a preliminary injunction**; and the NIH has simply "appealed" from the district court's questioning of its statement of facts, its proper role in the litigation, and the presence of federal jurisdiction over this action, which was filed in state court on the basis of state law claims.

What the NIH is seeking to do by this "appeal" is to have this Court dismiss the plaintiffs' action with prejudice, without having to respond to discovery aimed at determining whether the federal courts even have jurisdiction over the case. Although the district court ordered discovery to proceed on this issue pending the "appeal", (see attachment A) defendants have refused to respond to plaintiffs' discovery and a motion to compel is now pending

in the district court (see attachment B).

This case is not ripe for appeal, both because defendants have appealed from interlocutory orders and because discovery has not been completed concerning the federal courts' basis for jurisdiction.

II. Statement of Facts

On September 11, 1981, Maryland police officers executed a warrant at the Silver Spring facility of the Institute for Behavioral Research ("IBR"), a private research concern, and seized from the premises seventeen macaque monkeys who have since become known as the "Silver Spring Monkeys". The appalling conditions in the laboratory and the unjustifiably cruel treatment to which the animals were subjected (including the "toxic stimuli avoidance test" in which electrical shocks were applied repeatedly to the animals' testicles to determine whether they would attempt to avoid the "stimuli"[2]) resulted in the criminal prosecution of Dr. Taub, the principal investigator conducting the experiments.[3]

The NIH, which had funded the experiments on the Silver Spring Monkeys, withdrew IBR's grant. During the prosecution of Dr. Taub, custody of the monkeys was temporarily placed in some of plaintiffs, and later in NIH.

---

[2] They did, but the experiments were continued nonetheless.

[3] Dr. Taub was convicted of multiple counts of animal cruelty. His convictions were later set aside because the Maryland statute was found not clearly to apply to scientific research. *Taub v. State of Maryland*, 296 Md. 439, 482 A. 2d 8191983). The Maryland legislature then amended the statute to express its clear intention that the statute should be applied to researchers. Md. Code, art. 27, Sec. 59 (Amended 1984).

Animal rights groups, including some of the plaintiffs in this action, filed separate actions in Maryland state courts and in the federal district court for the District of Columbia. In both actions, the plaintiffs attempted to enforce the provisions of the federal Animal Welfare Act,[4] 7 U.S.C. Sec. 2131 *et seq.* Specifically, the plaintiffs sought to enjoin the return of the silver spring Monkeys to IBR. *The NIH responded that it lacked the authority to prevent the transfer because the monkeys belonged to IBR.*[5]

In correspondence back and forth between NIH and IBR, each party attempted to deliver the monkeys to the other, each claiming it had no need or use for the monkeys. (See attachments C & D, attached as exhibits A & B to plaintiffs' "Memorandum in Opposition to Defendants' Motion to Dismiss and in further support of Plaintiffs' Motion to Remand"). The NIH declared, "we have no research protocols, either ongoing or planned, for which these animals are appropriate", (attachment D). Neither NIH nor IBR would agree to deliver the animals to the plaintiffs, however, presumably because of the threat animal rights organizations are perceived to pose to mnedical research, whether or not such concerns are even implicated.

---

[4] In the state court action, the plaintiffs also asserted state law claims. That action was removed to the Maryland District Court, where a magistrate ruled that the plaintiffs lacked standing to enforce the federal statute. The ruling was affirmed on appeal, *International Primate Protection League, et al. v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986). The court declined to exercise pendent jurisdiction over the state claims, which were therefore never addressed. *Id.*

[5] In brief, the NIH argued: "NIH has no summary authority to recover the monkeys even in the event that it terminates funding of the research project." Memorandum in Support of Motion to Dismiss, p. 18, The Humane Society of the United States v. Black, No. 81-2691 (USDC for the District of Columbia).

While IBR, NIH, and plaintiffs were discussing custody of the monkeys, the Maryland state court order vesting custody in the NIH **expired under its own terms.**[6] Nevertheless, the NIH retained the monkeys at the taxpayers' expense, now exceeding $67,000.00. (See Affidavit of William Raub, attached to NIH's reply to opposition to motion to dismiss (No.1)), and had them transferred to Tulane's Delta Regional Primate Center, as public outcry over the NIH's conduct intensified and congressional demands rose for the animals' transfer to any of the several private sanctuaries willing to accept them at no expense to the government. See e.g. attachment E *en globo* (attached as exhibits D & E to plaintiffs' opposition to motion to dismiss and support of motion to remand). In June of 1986, the NIH assured interested congressmen that the animals would not undergo invasive research procedures, but would live out their natural lives under "strict standards designed to promote their health and well-being;" upon their **natural** deaths, the animals were to be autopsied. (Letter of June 9, 1986, Dr. James Wyngaarden, Director NIH, to Congressman Robert Smith; attachment F, here and to opposition to motion to dismiss.)

In December of 1988, the NIH startled plaintiffs and their congressional supporters with the announcement that they intended to euthanize three of the animals immediately. The NIH is now claiming that although it has no use for the animals in life, it has discovered some basis for experimentation on them after their deaths. The NIH admits

---

[6] The order stated: "This Order, . . will remain in effect until further Order of this Court or the termination of the pending proceeding against Dr. Taub, whichever occurs first." (See Exhibit A to NIH's reply to opposition to motion to dismiss (No.1)). There was no further order of the court and as noted in footnote 3, *Supra*, the Taub prosecution was concluded in 1983.

that this newfound experimental purpose does not call for the euthanasia of the animals. It claims to have made the euthanasia decision **entirely independent of considerations of medical research** and based on an unsubstantiated allegation that the animals are in pain. It is that decision which plaintiffs have challenged. Plaintiffs have made no attempt to interfere in the planned post-mortem research offering to preserve the animals for testing following their **natural** deaths.

When the NIH announced the planned euthanasia, the instant suit was promptly filed asserting a number of state law claims. Although plaintiffs questioned the NIH's legal interest in the matter, they named as a defendants IBR, the owner, Tulane, the physical custodian, and NIH because NIH claimed responsibility for the decision to euthanize. On December 29, 1988, a civil district court Judge issued a temporary restraining order prohibiting euthanasia of any of the monkeys.

The NIH removed the case to federal court and plaintiffs moved unsuccessfully to remand. Shortly after the removal, counsel for plaintiffs and NIH met with the district court to discuss extension of the Temporary Restraining Order issued by the state court. Counsel for the NIH advised the court that she intended to bring a motion to dismiss based on *res judicata*; she further stated that she had no objection to the court's maintaining the *status quo* pending disposition of the motion to dismiss. The NIH fixed the hearing on its Motion to Dismiss on February 1, 1989. When the motion was denied on that date, the NIH requested and was granted leave to file a renewed Motion to Dismiss emphasizing different issues. It fixed the renewed Motion to Dismiss for hearing in mid-March, but the hearing was continued to April 12, 1989, because plaintiffs' counsel was in trial on the date initially

set.

On April 12, 1989, the district court denied NIH's renewed Motion to Dismiss. Thereafter, NIH filed a notice of appeal and later an *ex parte* motion for stay pending appeal. Plaintiffs opposed the stay, partly on the ground that NIH had no right to appeal from the court's interlocutory order. Apparently realizing the impropriety of its appeal, the NIH then filed, the day before the May 3, 1989 hearing on the motion to stay, a bizarre and unprecedented "Motion for an Indicative Ruling." By this motion the NIH attempted to legitimize its "appeal" by having the district court declare that it would not dissolve the Temporary Restraining Order that had been in effect since December 29, 1989, beyond the time provided by Rule 65(b) of the Federal Rules of Civil Procedure. Obviously, the NIH had realized that its appeal would only be entertained by this Court if the Temporary Restraining Order were regarded as a preliminary injunction.

This was the **first** notice the NIH gave the Court that it was withdrawing its consent to the extension of the Temporary Restraining Order, or that it objected to the delays in the proceedings that had been occasioned solely by its own procedural maneuverings. The court declared with respect to the motion for indicative ruling, "this is the first time I have heard of this in my life." However, she ruled that if the 5th Circuit remanded the case, "the matter would be set down for a preliminary [injunction] hearing." (Tr., May 3, 1989, p.21) Responding to the NIH's argument that the Temporary Restraining Order had been converted into a preliminary injunction by virtue of its duration, the court recalled that "the government reluctantly acquiesced in an extension," (*Id.* at 28), and further stated that even if it were viewed as a preliminary injunction she considered that the equities weighed in favor of its issuance because

"once they [the monkeys] are dead, they are dead, you can't bring them back to life," (*Id.* at 22).

The principal question at this May 3rd hearing, however, and one that has received no mention in the NIH's brief, was whether or not federal jurisdiction had been established. Interrupting the NIH's argument that plaintiffs had not proven jurisdiction, the court stated:

> . . .I am not sure that I have jurisdiction either. The problem that has been advanced to me consistently is the failure of the plaintiffs to be permitted to discover. We don't know why the government is in this suit, quite frankly. The government intervened,[7] but there are serious questions as to whether they even should have custody of these monkeys.
>
> * * *
>
> I have denied the plaintiffs' motion to remand because nobody has advanced a reason to this Court whether their custody has not expired by some operating agreements or whatever agreements. I just felt that this Court was put in a position to attempt to rule on these motions when nobody had advanced anything to the Court.

(*Id.* at 5-6)

[7] As counsel pointed out subsequently, the NIH had not formally intervened but had been named as a defendant. However, at an earlier hearing, plaintiffs' counsel had proposed dropping NIH as a defendant, to which the NIH responded that it would simply intervene. The court's reference was undoubtedly to that discussion.

Counsel for the NIH asserted, "the NIH does have an interest in this case, obviously, Your Honor, and that's to fulfill its mission which is to conduct research on these monkeys." (*Id.* at 15). The Court properly responded to this unsubstantiated claim as follows:

> **You know, you say that, but no one has shown me one document that permits that.** I mean, you know, it's sort of like working in a vacuum. The government has not given me one document. **The only documents we have ever seen have shown that the Government's interest has long expired.** Now maybe there were some subsequent documents, I have never seen those. The government has refused — I shouldn't say refused, but they certainly have not done anything to show me that they have an interest in this case, and from what I can understand from Ms. Woodward, she has been attempting to get that information for a long time, even in other previous times, and has been unable to do so, so we have received nothing where this Court can definitely say that, sure, this document shows that the government does have an interest. We don't have anything. It has never been produced, never, to this Court.

(*Id.* at 15-16; emphasis supplied).

Counsel for the NIH answered weakly, " I am not prepared to address the existence or non-existence of any document." (*Id.* at 17). He continued with a valiant bootstrapping heave: "We're under a temporary restraining order. . . that certainly seems to give us an interest, Judge, of some kind." (*Id.*).

The court then ruled, and several times reiterated its ruling, that discovery must be permitted to go forward on the jurisdictional issue, the "very issue" before the Fifth

Circuit and in case of remand, the "next issue before this Court." (*Id.* at 20, 25, 26, 27-28). Incredibly, the NIH, in spite of the pointedly direct comments and ruling of the Court, **has still refused to cooperate in discovery.** It answered plaintiffs' interrogatories and requests for production in only two ways: 1) by referring to its self-serving affidavits previously filed in connection with the Motions to Dismiss and previously found inadequate by the district court; and 2) by objecting to all other interrogatories and requests. Included in the latter category were interrogatories directed at discovering any documents pertaining to the NIH's interest in the monkeys and records of who had made the decisions and funded expenses associated with the monkeys. A motion to compel discovery and for sanctions has been set for hearing on August 16, 1989.

III. Argument

A. *No Appealable Order Has Been Entered*

The NIH acknowledges, as it must, that an appeal will not lie from the denial of a Motion to Dismiss or the granting of a temporary restraining order. It contends, however, that the Temporary Restraining Order has been coverted into a preliminary injunction by time and by the court's statements in response to the "motion for indicative ruling." But the NIH's vigorous attempts at alchemy cannot transform this leaden "appeal" into gold.

First, as noted above, the NIH consented to the extension of the Temporary Restraining Order pending the Court's hearings on its Motion to Dismiss. By avoiding a preliminary injunction hearing, the NIH avoided all discovery, including discovery of its rightful place as a

party in the litigation. The NIH obviously hoped, and still hopes, that it could prevail on procedural grounds without ever confronting any of the myriad factual and legal issues adverse to it. It was only after the NIH had 'ap pealed" from the interlocutory denial of its motion to dismiss that it began to rethink its position and recast the nature of the Temporary Restraining Order.

The moment of the NIH's awakening is apparent. After it had "appealed", the NIH, consistent with its prior position that plaintiffs should have no discovery, moved *ex parte* for a stay pending the appeal. Plaintiffs opposed the stay, principally on the ground that the NIH had no right of appeal. On the evening before the hearing on the motion to stay, the NIH filed its peculiar "motion for an indicative ruling" by which it attempted, after-the-fact, to withdraw its prior consent to the extension of the Temporary Restraining Order, to transform the Temporary Restraining Order into a preliminary injunction, and thus to validate its appeal. That the NIH had not realized its procedural error to this point is apparent from the fact that **the NIH had not appealed from the issuance of an injunction or the undue extension of a Temporary Restraining Order but " from the order entered on April 12, 1989"** [denying the motion to dismiss and making no mention of the Temporary Restraining Order]. (See, NIH Notice of Appeal, April 17, 1989).

In an effort to give this transparent bootstrapping operation more lift, the NIH then filed a **second** notice of appeal from the denial of its motion for indicative ruling. However, at this point there was nothing to appeal **from**, because the NIH had divested the district court of jurisdiction by filing its first, improper notice of appeal. See, footnote 1 of NIH's brief, p.3; *Taylor v. Sterrett*, 640 F.2d 663, 667 (5th Cir. Unit A 1981); *Henry v. Independent American*

Savings Association, 857 F.2d 995, 997 (5th Cir. 1988); 16 Wright et al., *Federal Practice and Procedure* Sec. 3949 at 358-59 (1977).

Equally important, the Temporary Restraining Order was not transformed into a preliminary injunction at this peculiar juncture in the proceedings. Although the trial court stated that she would not dissolve the Temporary Restraining Order "or if you want to call it an injunction or whatever" because of the equities in the case, (Tr. May 3, 1989 hearing, p. 25), she clearly ruled that she would set the case for a preliminary injunction hearing upon remand by this Court, (*Id.* at 21). Thus, this is not a case in which the district court has attempted "to shield its orders from appellate review merely by designationg them as temporary restraining orders rather than as preliminary injunctions," NIH brief at p.2, quoting *Sampson v. Murray*, 415 U.S. 61, 86-87 (1974). Rather, on the first notice that the NIH was withdrawing its consent and wanted a preliminary injunction hearing, the court stated that it would fix one when it regained jurisdiction.

Under these circumstances, there is no reason to regard the Temporary Restraining Order as a preliminary injunction or to consider an "appeal" from an interlocutory order made on a record that is "replete with factual issues" including "where the governmental interest [on which federal jurisdiction has been premised] lies in this case." (District Court's comments, hearing 4/12/89, p.3)

B. ***Federal Jurisdiction Has Not Been Established***

As noted above, the district court has rightfully expressed serious reservations about the existence of federal jurisdiction over this action, which is grounded in state law. The case was filed in the Civil District Court for the

Parish of Orleans and removed to federal district court by the NIH on the ground that a federal agency, the NIH, had been named as a defendant. Plaintiffs moved to remand on the ground that removal was permitted only in actions against federal officers not agencies, see memorandum in Support of Motion to Remand, and also questioned the NIH's legal interest in the case, see plaintiffs' supplemental memorandum in support of remand. Plaintiffs' proposal to drop the NIH as a defendant was met by the NIH's statement that it would simply intervene, and the district court has repeatedly called for discovery on the basis of NIH's asserted interest. The NIH, however, has produced only a plainly expired order and its own unsubstantiated declarations of interest. In the face of its prior assertions that IBR was the owner of the Silver Spring Monkeys and that the NIH had no authority to determine their fates, the NIH's present position is highly suspect.

Moreover, the NIH has refused to respond to discovery **ordered** by the district court to resolve the factual dispute. Absent such discovery, which is the subject of a motion to compel pending in the district court, this Court is in no better position than was the trial court to determine the jurisdictional question.

The NIH, in pressing an invalid appeal on multiple procedural issues, has placed the cart before the horse. Federal jurisdiction is the threshold question, and it must be answered affirmatively **before** the NIH's questions can be addressed. Unless this Court has jurisdiction, it cannot reach the issues raised by the NIH. On the present record, however, the jurisdictional question cannot be answered. The NIH, which has refused to confront the matter of jurisdiction, is in effect asking this Court to support its recalcitrance and **assume** jurisdiction so that it can proceed to adjudicate claims that are not properly before the Court.

Nothing could be more offensive to the "presumption . . . that every federal court is 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *Oliver v. Trunkline Gas Co.*, 789 F.2d 341, 343 (5th Cir. 1986), reh. den. 796 F.2d 86. This presumption flows inescapably from the principle "of first importance" that federal courts are courts of limited jurisdiction by origin and design. *Id.*, and Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Sec. 3522. Thus, as Wright, Miller and Cooper have stated at pages 61-62: "because it would not simply be wrong but indeed would be an unconstitutional invasion of the powers reserved to the states if the federal courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court."

Contrary to these established principles "the government's position," as stated by its counsel at the May 3rd hearing, "is that it's up to the Plaintiffs to show at the outset that there's jurisdiction, and that it's improper. . . for the Plaintiffs to come into Court and say, 'we need discovery in order to establish jurisdiction.'" (Tr. at p.6). The NIH's attempted re-allocation of the burden of proof runs counter to the Supreme Court's holdings that the burden is on the party claiming jurisdiction to demonstrate that the court has jurisdiction over the subject matter. *Thompson v. Gaskill*, 315 U.S. 442, 625 Ct. 673 (1942); *Gibbs v. Buck*, 307 U.S. 66, 72, 59 S.Ct. 725, 729 (1939).

As the district court properly noted, plaintiffs filed suit in state court and the NIH removed, and plaintiffs have consistently challenged the removal and the court's jurisdiction, placing the burden of proving jurisdiction squarely on the NIH's shoulders. Worse than the NIH's

failure to carry its burden of establishing jurisdiction is its opposition to plaintiffs' discovery into its alleged jurisdictional basis. On the one hand NIH asserts, wrongly, that plaintiffs must prove the existence of jurisdiction that plaintiffs deny; on the other, NIH argues that plaintiffs are not entitled to discovery on the issue. When the district court clearly, properly, and firmly ordered discovery to proceed on this issue, the NIH simply refused to produce any new information.

The jurisdictional problem presented is no less acute for this Court than it was for the district court. The Supreme Court has said: "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a case under review." *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165 (1934).

Because jurisdiction does not appear affirmatively from the record, the instant appeal should be dismissed.

IV. *Conclusion*

It should be apparent from the preceding discussion that the NIH has been toying not only with plaintiffs but with the courts in this matter.

The NIH has removed a state court action to federal court, asserting subject matter jurisdiction that plaintiffs have consistently challenged. Instead of addressing the threshold jurisdictional question, NIH proceeded along its own agenda of repeated motions to dismiss. When those failed, the NIH lodged an improper appeal. It then sought to block further discovery by an improper *ex parte* motion for stay. When the legitimacy of the appeal and the stay was properly assailed, NIH brought an unheard-of motion in a court it had stripped of jurisdiction. When the motion

failed, NIH pointed to its own self-serving and *ex post facto* filing as an expression of **prior** opposition to the Temporary Restraining Order. When plaintiffs moved to dismiss the appeal, the NIH failed to respond timely, and instead, without any notice to plaintiff, sought the Court's approval for the incorporation of its opposition in its brief on the merits. NIH apparently considered that its misrepresentative statement of the issue in the case of "plaintiffs vs. world health" would deflect attention from the jurisdictional problem. Meanwhile, the NIH has flouted the district court's order concerning jurisdictional discovery, subverting plaintiffs' right and ability to contest jurisdiction.

The federal government, in the person of the NIH, has lost sight of its representative nature in this litigation and has turned its might and resources on the unfair and oppressive obstruction of plaintiffs' rights to question its positions through judicial process. The appeal should be dismissed and the case remanded for resolution of the jurisdictional issue.

Respectfully Submitted,

MARGARET E. WOODWARD
BAR NO. 13677
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: 504-525-9538
Attorney For Plaintiffs

NOTE: CERTIFICATE OMITTED